Supreme Court, U.S.
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No. 05-1541

IN THE

Supreme Court of the United States

EC TERM OF YEARS TRUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The following question is presented:

Whether a party who would have been entitled to commence a timely action under 26 U.S.C. § 7426 to challenge an allegedly wrongful Internal Revenue Service levy upon its property to collect taxes owed by another, but failed to commence such an action within the applicable limitations period, may seek a refund of the amount collected by the levy through a tax-refund action under 28 U.S.C. § 1346(a)(1).

LIST OF PARTIES

All parties to this action are fully and correctly listed in the caption.

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This case presents a question of whether Congress intended that 26 U.S.C. § 7426 be the sole and exclusive remedy available to a third party whose property has been seized under a levy to satisfy taxes due by other taxpayers or whether Congress intended that the refund statute, 28 U.S.C. § 1346 continue to be available to a third party regardless of whether the third party failed to file a timely claim under 26 U.S.C. § 7426. Congressional intent evidenced by the language of 26 U.S.C. § 7426 indicates that this statute did not preempt 28 U.S.C. § 1346 and did not become an exclusive remedy. Congressional intent as evidenced by reference to legislative history also indicates that Congress did not intend for 26 U.S.C. § 7426 to be the sole and exclusive remedy for a wrongful levy. Further, reasonable inferences drawn from the structure of 26 U.S.C. § 7426 do not support the conclusion that it was intended by Congress to be a sole and exclusive remedy for a wrongful levy. The Fifth Circuit erroneously concluded that Congress intended that 26 U.S.C § 7426 be the sole and exclusive remedy from the legislative history due to the fact that 26 U.S.C. § 7426 had a shorter statute of limitations than 28 U.S.C. § 1346. This Court should reverse the Fifth Circuit's judgment and hold that 28 U.S.C. § 1346 is available to a third party whose property has been seized through a wrongful levy even if the third party had an opportunity to utilize 26 U.S.C. § 7426.

OPINIONS AND ORDERS

The Fifth Circuit affirmed the November 22, 2004, decision of the United States District Court for the Western District of Texas - El Paso Division, reported at 2004 WL 911307 (not reported in the Federal Supplement). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *E.C. Term of Years Trust v. United States*, 434 F.3d 807 (2006).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). The District Court's order was entered on November 22, 2004. The Fifth Circuit's opinion was rendered on January 3, 2006. A petition for a panel rehearing was denied on March 2, 2006.

STATUTORY PROVISIONS INVOLVED

Title 26 United States Code, Section 7426.

(a) Action permitted

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may brig a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

Title 28 United States Code, Section 1346.

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Courts [United States Court of Federal Claims], of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax

> alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws[.]

STATEMENT OF THE CASE

In 1991, Elmer W. Cullers, Jr. and Dorothy Cullers created the EC Term of Years Trust to reduce the impact of federal estate taxes on their estates. In 1993, the Internal Revenue Service assessed additional federal income taxes, penalties and interest against Elmer W. Cullers, Jr. and Dorothy Cullers for tax years 1981 through 1984. In 1999, claiming that the Cullers had transferred property to the EC Term of Years Trust to avoid paying federal income taxes, the Internal Revenue Service filed transferee tax liens against the EC Term of Years Trust for the tax liability owed by the Cullers

In 1999, the Internal Revenue Service threatened to take legal action against the EC Term of Years Trust to seize and sell its property to satisfy the tax obligations of the Cullers. To avoid the sale of its property, in 1999 the EC Term of Years Trust deposited the total amount of taxes, penalties and interest due by Elmer W. Cullers, Jr. and Dorothy Cullers in a bank account and notified the Internal Revenue Service so that it could levy on the account. On September 10, 1999, the IRS levied on the bank account established by EC Term of Years Trust, which contained $3,389,426.37, and seized all funds therein to satisfy the tax liabilities owed by the Cullers. (Joint Appendix, paragraph 8 of Exhibit B attached to Exhibit D)

In September 2000, EC Term of Years Trust and other entities filed a complaint for a wrongful levy under 26 U.S.C. § 7426; however, the complaint was filed more than nine months after the levy. On December 28, 2000, the District Court dismissed the complaint for wrongful levy for lack of subject matter jurisdiction because it had been filed more than nine months after the levy and was time barred under 26 U.S.C. § 7426.

On September 6, 2001, EC Term of Years Trust filed an administrative claim for a refund for the amount seized by the Internal Revenue Service under the levy. After the claim for a refund was denied, on September 6, 2001, EC Term of Years Trust filed a complaint for a refund of the $3,389,426.37 in the United States District Court for the Western District of Texas - El Paso Division under 28 U.S.C. § 1346. On November 22, 2004, the District Court held that Petitioner's sole remedy was under 26 U.S.C. § 7426 and dismissed Petitioner's Complaint for lack of subject matter jurisdiction.

Petitioner appealed the case to the Fifth Circuit in reliance on this Court's holding in *United States v. Williams*, 514 U.S. 527 (1995) and the Ninth Circuit Court of Appeal's holding in *WWSM Investors v. United States*, 64 F.3d 456 (9th. Cir. 1995). The Fifth Circuit held that the wrongful levy procedure under 26 U.S.C. § 7426 is the exclusive remedy for a wrongful levy and affirmed the dismissal of EC Term of Years Trust's Complaint for lack of subject matter jurisdiction.

SUMMARY OF THE ARGUMENT

Whether 26 U.S.C. § 7426 is the exclusive remedy available to a third party whose property has been seized under a levy the Internal Revenue Service involves a determination of congressional intent. 26 U.S.C. § 7426 does not contain a provision that it is the sole and exclusive remedy of a third party such as EC Term of Years Trust whose property has been seized by a wrongful levy. Other provisions of the Internal Revenue Code have been made expressly exclusive when Congress so intended. Congressional intent to make 26 U.S.C. § 7426 exclusive cannot be shown through a review of the Senate and House Reports that were published shortly before 26 U.S.C. § 7426 was enacted as part of the Federal Tax Lien Act of 1966. Congressional intent also cannot be inferred from the structure of 26 U.S.C. § 7426 because it does not evidence that Congress was creating a comprehensive scheme to deal with a situation that was previously not subject to judicial action. The Senate and House committee reports clearly show that third parties whose property had been seized by the Internal Revenue Service had judicial remedies and that the purpose of 26 U.S.C. § 7426 was merely to clarify and codify those remedies. The argument that Congress must have intended for 26 U.S.C. § 7426 to be exclusive simply because it contains a shorter statute of limitations than 28 U.S.C. § 1346 completely ignores the accepted methods of determining Congressional intent and was rejected by this Court in *United States v. Williams*, 514 U.S. 527 (1995). The rationale used by the Fifth Circuit Court of Appeals in fashioning its holding in conformity with the holding of *United Sand & Gravel v. United States*, 624 F.2d 733 (5th Cir. 1980), does not correctly apply the rules of determining congressional intent and has now been undercut by the holding in *Williams*. There is no

basis to confine the holding in *Williams* to its facts because to do so would constitute legislating tax policy, which is the exclusive domain of Congress.

ARGUMENT

The issue to be decided is whether the EC Term of Years Trust, which paid taxes assessed against Elmer W. Cullers, Jr. and Dorothy Cullers under a levy on a bank account that was created to avoid a threatened sale of property by the Internal Revenue Service, may utilize the refund provisions of 28 U.S.C. § 1346, even though it had an opportunity file a complaint for a wrongful levy under 26 U.S.C. § 7426.

This issue can be decided only by determining whether Congress intended 26 U.S.C. § 7426 to preempt the pre-existing refund provision in 28 U.S.C. § 1346 and thus become the exclusive remedy available to a third party whose property was seized under an allegedly wrongful levy, or whether Congress intended the two statutes to co-exist as alternative remedies.

28 U.S.C. § 1346 and 26 U.S.C. § 7426 of the Internal Revenue Code constitute a grant of jurisdiction and a waiver of sovereign immunity. Both statutes authorize suits against the United States to recover property taken in connection with the collection of taxes.

A. Pre-26 U.S.C. § 7426 Practice

28 U.S.C. § 1346 was enacted in 1948. 26 U.S.C. § 7426 was enacted in 1966. In the pre-26 U.S.C. § 7426 era, federal courts permitted third parties to restrain wrongful levies; *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952); *Tomlinson*

v. Smith, 128 F.2d 808 (7th Cir. 1942); *Rothensies v. Ullman*, 110 F.2d 590 (3d Cir. 1940); and to obtain declaratory judgments on rights to property; *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962). Federal courts also permitted third parties to recover money wrongfully taken even if deposited with the Treasury Department. *Stuart v. Chinese Chamber of Commerce*, 168 F.2d 709 (9th Cir. 1948); *Karno-Smith Co. v. Maloney*, 112 F.2d 690 (3d Cir. 1940); *Szerlip v. Marcelle*, 136 F. Supp. 862 (D.C. N.Y. 1955); *Colorado Milling & Elevator Co. v. Glenn*, 118 F. Supp. 943 (D.C. Ky, 1954). During this period, the Government often contended that third parties seeking a return of funds from the IRS were subject to the refund procedure in the Internal Revenue Code. *United States v. Worley*, 213 F.2d 509 (6th Cir. 1954). In the years before the enactment of 26 U.S.C. 7426, actions of assumpsit for money had and received were brought against the tax collector personally rather than the United States. Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 Iowa L. Rev. 312, 327 (1963).

B. The Primary Post-26 U.S.C. § 7426 Cases

The first Fifth Circuit decision on the exclusivity of 26 U.S.C. § 7426 was *United Sand & Gravel Contractors, Inc. v. United States*, 624 F.2d 733 (5th Cir. 1980). In this case a subcontractor claimed an interest in funds due to the general contractor that had been seized by the Internal Revenue Service to satisfy the general contractor's tax liability. The subcontractor sued under the Quiet Title Act (28 U.S.C. 2410) more than nine months after the Internal Revenue Service had seized the funds under a levy. The Fifth Circuit held that 26 U.S.C. § 7426 was the exclusive remedy by relying on the reasoning in *United States v. A.S. Kreider Co.*, 313 U.S. 443 (1941). In *Krieder*, the taxpayer had filed

suit to recover taxes within the six year limitations period under the predecessor of 28 U.S.C. § 2401 but not within the time period set forth in the Revenue Act of 1926. The Court held that, since the six-year statute was phrased in the negative, Congress was free to shorten the period of limitations by specific legislation for a certain class of claims. *Kreider*, 313 U.S. at 447. The Court stated that to not give effect to the shorter period would render the subsequent statute meaningless. *Id.* at 448.

The Fifth Circuit noted that 28 U.S.C. § 2401 was also worded in the negative and, following the rationale of *Kreider*, held that this fact evidenced an intent on the part of Congress for 26 U.S.C. § 7426 to be the exclusive remedy. *United Sand & Gravel*, 624 F.2d at 738. The court also concluded that any different conclusion would undercut the shorter period of limitations in 26 U.S.C. § 7426. *Id.* In buttressing its holding in *United Sand & Gravel*, the Fifth Circuit also referred to the Senate committee report that contained a statement that the United States could not be sued by a third party whose property was seized to satisfy the tax liability of another person. *United Sand & Gravel*, 624 F.2d at 739. In this regard, the Fifth Circuit's reasoning appears to be based on the conclusion that since, prior to 26 U.S.C. § 7426, the United States could not be sued directly by a third party whose property had been seized, 26 U.S.C. § 7426 had to be the exclusive remedy. The Fifth Circuit even stated that the United States need not provide parties such as United Sand with alternative remedies. *Id.* at p. 739. In *United Sand & Gravel*, the Fifth Circuit found Congressional intent based on its conclusion that to hold otherwise would render the nine month statute of limitations to be meaningless. *Id.*

The exclusivity analysis used by the Fifth Circuit in *United Sand & Gravel* was not followed by the Court of Claims in *Gordon v. United States*, 649 F.2d 837 (1981), which involved a case under the Tucker Act. In *Gordon*, the issue was whether Congress withdrew Tucker Act jurisdiction from the Court of Claims when the Tax Lien Act of 1966, which included 26 U.S.C. § 7426, was enacted. Prior to 26 U.S.C. § 7426 , third parties brought levy actions in the Court of Claims under an implied contract theory. *Kirkendall v. United States*, 31 F. Supp. 766 (Cl. Ct. 1940). The Government argued that the 26 U.S.C. § 7426 provided the exclusive remedy for third party levy actions and that after the passage of 26 U.S.C. § 7426, third party levy actions could no longer be brought in the Court of Claims. The Court of Claims noted that when Congress passed 26 U.S.C. § 7426, it did not grant the district courts exclusive jurisdiction over third party levy contests and that the statute did not contain mandatory language as might be expected if Congress intended for its provisions to be exclusive. *Gordon*, 649 F.2d at 839. The Government argued that the Court of Claims should infer that Congress intended that 26 U.S.C § 7426 be exclusive because Congress was unaware that the Court of Claims was handling third party levy contests under the Tucker Act. *Gordon*, 649 F.2d at 840. The Court of Claims disposed of this argument by making reference to the Final Report of the American Bar Association's Committee on Federal Tax Liens. This report was included in the legislative history of the Tax Lien Act. The Court of Claims noted that the ABA report contained a statement indicating that "while decisional law generally allowed third parties to contest levies in the district courts, there was some uncertainty whether the district courts had jurisdiction to grant injunctive and declaratory relief if the nominal defendant was the United States rather than the tax collector." *Gordon*, 649 F.2d at 840.

The Court of Claims also noted that the ABA report also made reference to the right of third parties to seek relief under the Tucker Act in the Court of Claims. *Id.* at 840- 841. After its review of the legislative history of 26 U.S.C. § 7426, the Court of Claims concluded that Congress well understood that the Court of Claims was handling third party levy claims before the enactment of 26 U.S.C. § 7426, and that the focus of the new section was to clarify uncertainties in the relief that a district court might provide. *Gordon*, 649 F.2d at 841. The Court of Claims also examined and rejected the argument by the Government that exclusivity should be inferred from the structure of 26 U.S.C. § 7426. *Id.* at 842. In the end, the Court of Claims held that 26 U.S.C. § 7426 did not deprive it of exercising Tucker Act jurisdiction.

In *United States v. Williams*, 514 U.S. 527 (1995), the issue was whether Ms. Williams, who, under duress, paid taxes assessed against her former husband in order to remove a tax lien on her property, could pursue a tax refund under 28 U.S.C. § 1346. The Government first argued that the provisions of 28 U.S.C. § 1346 must be read *in para material* with 26 U.S.C. § 6511, which requires that a taxpayer file a refund claim, and 26 U.S.C. § 7701, which defines a taxpayer as a person subject to the tax. The Government posited that, since Ms. Williams did not fall within the definition of a taxpayer, she did not have standing to bring a refund action under 28 U.S.C. § 1346. The second argument was that, if third party refund suits under 28 U.S.C. § 1346 were allowed, 26 U.S.C. § 7426 would be rendered superfluous. This argument was premised on the notion that, prior to the enactment of 26 U.S.C. § 7426, third parties did not have the right to sue the Government and that Congress would not have needed to provide for third party remedies if refund suits had been allowed under prior law. The third argument

was that Ms. Williams had other forms of relief available to her such as a suit to quiet title under 28 U.S.C. § 2410. Finally, the Government argued that, if third party refund suits were allowed, collection efforts against the taxpayer against whom the assessment had been made would be frustrated.

This Court disposed of each of these arguments in holding for Ms. Williams. On the issue of whether Ms. Williams was a taxpayer, this Court noted that, even if 28 U.S.C. § 1346 has to be read *in para material* with other provisions of the Code, the definition of a taxpayer is broad enough to include third persons who actually paid the taxes. *Williams*, 514 U.S. at 536. Further, 28 U.S.C. § 1346 by its own terms does not limit refund jurisdiction to assessed taxpayers. *Id.* at 536. This Court also noted that 26 U.S.C. § 7426 simply represented a codification of the existing common law action that third parties had historically brought against the tax collector to recover money erroneously collected. *Id.* at 531. This Court also noted that, since no levy had been served on Ms. Williams, Section 7426 was not available to her in any event. *Id.* at 536. Finally, this Court rejected the very rationale used in *United Sand & Gravel* by refusing to agree with the Government's argument that the use of 28 U.S.C. § 1346 would render superfluous other actions such as wrongful levy. *Id.* at 540.

The Court also noted that 28 U.S.C. § 1346 is a post-deprivation remedy and is available only when the third party has paid the government in full. Conversely, a wrongful levy action offers pre-deprivation relief and is available even if the property in question has not been surrendered. *Williams*, 514 U.S. at 540. The holding in *United States v. Williams* at least stands for the proposition that the reach of 28 U.S.C. § 1346 is broad enough to include a third party who pays the

tax of another party under duress and does not have another remedy. By framing the holding in *Williams* in terms of Congressional intent, the case must also stand for the proposition that Congress did not generally intend for 28 U.S.C. § 1346 to be unavailable to third parties.

While this Court noted that Ms. Williams could not have brought a wrongful levy action or a quiet title action or substitute a fund for the Government's lien, this was not the basis for the holding. This Court noted that the refund procedure was even more compelling in this case because Ms. Williams could sell the property, pay off the lien and then seek a refund from the Government. *Williams* at p 536. Interestingly, neither the federal courts nor the Internal Revenue Service appear to have ever taken the position that an assessed taxpayer is precluded from pursuing a refund simply because the overpayment arose through a levy. Arguing that a different set of rules applies to third parties who pay is tantamount to arguing that the distinction between assessed taxpayers and third party taxpayers struck down by *Williams* is still alive and well.

In *Williams*, this Court put to rest this issue of whether a third person who pays the tax of another person is a taxpayer and has standing to bring a refund action. This Court noted that the Government had acknowledged the "evident breadth of 28 U.S.C § 1346 (a) (1) . . ." even though it was making other arguments to limit its effect. *Williams*, 514 U.S. at 531. *Williams* also put to rest the argument that if a third party such as Ms. Williams was able to utilize 28 U.S.C. § 1346, it would render other remedies to be meaningless.

The issue of exclusivity of 26 U.S.C. § 7426 was the focal point of *WWSM Investors v. United States*, 64 F.3d 456

(9th Cir. 1995). *WWSM* involved a levy of a bank account, as opposed to a payment of a tax lien as was the case in *Williams*. WWSM Investors filed its complaint under 26 U.S.C. § 7426 more than nine months following the levy. The district court denied WWSM Investors leave to amend its complaint to set forth a claim for a refund under 28 U.S.C. § 1346. The district court then dismissed the case on the ground that 26 U.S.C. § 7426 was the exclusive remedy and that it lacked subject matter jurisdiction because the claim was time-barred.

The Ninth Circuit Court of Appeals reversed the case and held that WWSM Investors had a separate cause of action for a refund under 28 U.S.C. § 1346. In concluding that 28 U.S.C. § 1346 is also available to a taxpayer who had an opportunity to utilize 26 U.S.C. § 7426, the Ninth Circuit relied upon this Court's holding in *Williams* regarding the breadth of 28 U.S.C. § 1346. *WWSM* at 459. The Ninth Circuit rejected the Government's attempt to create a distinction between a tax lien (*Williams*) and a levy (*WWSM*). The Ninth Circuit concluded that a tax lien and a levy were functionally equivalent. The Ninth Circuit was also not persuaded that the holding in *Williams* was limited to fact situations where the taxpayer bringing a refund action under 28 U.S.C. § 1346 could not have filed a wrongful levy action under 26 U.S.C. § 7426. In essence, the Ninth Circuit in *WWSM* held that 26 U.S.C. § 7426 was not the exclusive remedy available to a third party who paid the taxes of another assessed taxpayer, even though such taxpayer had an opportunity to file a complaint for a wrongful levy under 26 U.S.C. § 7426. The Ninth Circuit's holding in *WWSM* also stands for the proposition that Congress did not intend for 26 U.S.C. § 7426 to be the exclusive remedy in a wrongful levy context.

The Ninth Circuit Court of Appeals also spoke on the exclusivity issue in *Fidelity & Deposit Co. of Maryland v. City of Adelanto*, 87 F.3d 334 (9th Cir. 1996). This case involved a notice of levy served on the city for money owed to a third party. Fidelity & Deposit Co. contested the levy but not through the use of 26 U.S.C. § 7426. The district court dismissed the case partially on the grounds that the 26 U.S.C. § 7426 was the exclusive remedy and that, based on the facts, such an action was time-barred. In its opinion, the Ninth Circuit stated: "Thus, to the extent that a refund action is available, Section § 7426 is not the exclusive remedy for a wrongful levy and to this extent, *Winebrenner* has been overruled by *Williams*." *Fidelity & Deposit Co.*, 87 F.3d at 338.

In *Dahn v. United States*, 127 F.3d 1249 (10thCir. 1997), the Tenth Circuit Court of Appeals also dealt with the exclusivity issue involved with 26 U.S.C. § 7426 litigation. This case involved a seizure by the Internal Revenue Service of property owned by the Dahns to satisfy a tax liability of their parents. In holding that 26 U.S.C. § 7426 was the exclusive remedy in wrongful levy cases, the Tenth Circuit approved its holding in *United Sand & Gravel* and declined to follow the holding in *WWSM*. The Tenth Circuit also stated that *Williams* was not controlling because it dealt with the payment of a tax lien and not a levy and involved a person who did not have the opportunity to use 26 U.S.C. § 7426. The Tenth Circuit held that with respect to *United States v. Williams*, "There is no indication that the Court intended to reach beyond the confines of the case before it and overturn, sub silencio, the separate and well established principle that Sec. 7426 provides the exclusive remedy for a wrongful levy." *Dahn*, 127 F.3d at 1253.

C. The Disposition by the United States District Court

The district court, in its Order, conceded that this Court's holding in *Williams* rejected the law of the Fifth Circuit (District Court's Order, p. 4)[1] and stated the holding in *Williams* would have required a different result in *Snodgrass v. United States*, 834 F.2d 537 (5th Cir. 1987) on the issue of standing. However, the district court chose to dismiss Petitioner's complaint for a refund by concluding that the holding in *Williams* ". . . establishes an equitable exception for those who cannot otherwise avail themselves of pre - deprivation remedies." District Court's Order, p. 7. Essentially, the district court limited the holding of *Williams* to its facts.

D. The Disposition by the Fifth Circuit Court of Appeals

In *EC Term of Years Trust v. United States*, 434 F.3d 807 (2006), the Fifth Circuit followed the rationale set forth in *United Sand & Gravel*. The Court held that when 26 U.S.C. § 7426 is available to an individual, it is his sole and exclusive remedy. *EC Term of Years Trust* 434 F.3d at 810. The Fifth Circuit concluded that the holding in *Williams* regarding the reach of 28 U.S.C. § 1346 was limited to the situation where a remedy under 26 U.S.C. § 7426 is unavailable. *EC Term of Years Trust*, 434 F.3d at 810. The Fifth Circuit declined to follow the holding in *WWSM* that 28 U.S.C. § 1346 and 26 U.S.C. § 7426 generally coexist and are available to third parties as alternative remedies. Such a result would

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1. References to The Order of the United States District Court for the Western District of Texas, El Paso Division, in *EC Term of Years Trust v. United States*; Cause No. EP-03-CA-363(KC) (included in Appendix B of Petitioner's Appendix to the Petition for Writ of Certiorari) shall be cited herein to "District Court's Order."

"undermine the surety provided by the clear avenue to recovery under 7426." *EC Term of Years Trust* 434 F 3d at 810. The Fifth Circuit affirmed the District Court's dismissal of EC Term of Years Trust's Complaint for lack of subject matter jurisdiction.

E. Congressional Intent

26 U.S.C. § 7246 was added to the Internal Revenue Code by the Federal Tax Lien Act of 1966. A claim under 26 U.S.C. § 7426 must be brought not later than nine months after the date of the levy unless the third party sends a letter to the district director requesting a return of the property, in which event the time period is extended for an additional 12 months from the date of filing such a request. 26 U.S.C. § 6532(c)(2) (2000).

28 U.S.C. § 1346 was enacted in 1949. An action for a refund of taxes under 28 U.S.C. § 1346(a)(1) may be brought up to two years after the Internal Revenue Service disallows an administrative claim for refund. A claim for a refund may be filed up to two years after the tax is paid or up to three years after the taxpayer files a tax return with respect to the tax.. 28 U.S.C. § § 6511(a) (2000), 6532(a)(1) (2000).

Whether a statutory remedy is exclusive is a question of congressional intent. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989). Legislative intent is sometimes manifest in the language of the statute itself. For example, 26 U.S.C. § 7433(a) provides that its remedy for reckless or intentional Internal Revenue Service collection activity is exclusive. So also, 26 U.S.C. § 7435 provides that its remedy for unauthorized disclosure of tax information is exclusive.

26 U.S.C. § 7426 does not expressly state that its remedial provisions are exclusive or that it preempts the refund procedures set forth in 28 U.S.C. § 1346. This omission is of prime importance because, if Congress intended for 26 U.S.C. § 7426 to preempt 28 U.S.C. § 1346 and become the exclusive remedy, it could have easily provided for that result in the statute itself. This omission was duly noted in *Gordon* at 839 and 840.

An analysis of the language of 26 U.S.C. § 7426 (a) (1) also strongly suggests that Congress did not intend for it to preempt 28 U.S.C. § 1346:

> (1) Wrongful levy. If a levy has been made on property ... any person ... who claims ... that such property was wrongfully levied upon *may* (italics added) bring a civil action against the United States in a district court of the United States. Such action *may* (italics added) be brought without regard to whether such property has been surrendered to or sold by the Secretary.

If Congress intended for 26 U.S.C. § 7426 to preempt 28 U.S.C. § 1346, it surely would have used "shall" instead of "may" in order to indicate that its intent was that 26 U.S.C. § 7426 was to become the only remedy.

In the absence of any language in the statute, congressional intent can sometimes be ascertained by reference to the legislative history. In the case of 26 U.S.C. § 7426, the House and Senate committee reports indicate that the primary concern at the time was that third parties were not able to sue the Government directly when its collection efforts interfered with their property rights. The

House and Senate committee reports make it clear that at the time the Tax Lien Act was being debated, Congress was aware of the fact that third parties whose property rights were affected by collection efforts of the Internal Revenue Service had been filing suits against the collector or a district director.[2] *See generally*, Plumb, *Federal Tax Collection and Lien Problems, Part II*, 13 Tax Law Rev. 459 (1958). These cases were not technically suits against the Government but were treated as such in that the Government defended them and paid the costs. The House and Senate committee reports make it clear that Congress was clarifying that third parties could proceed directly against the Government in district court for a wrongful levy.[3] On the other hand, the House and

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2. Under present law, for example, the United States cannot be sued by third persons where its collection activities interfere with their property rights. This includes cases where the Government wrongfully levies on one person's property in attempting to collect from a taxpayer. However, some courts allow suits to be brought against district directors of Internal Revenue where this occurs. Technically, these suits are not against the Government, but, in fact, the Government defends them and pays all costs, so that the effect is practically the same as if these suits were brought against the United States." H.R. Rep. No. 89-1884 at 27 (1966); Sen. Rep. No. 89-1708 (1966), 1966 U.S.C.C.A.N. at 3750.

3. Your committee believes where the Government levies on property which, in part at least, a third person considers to be his, he is entitled to have his case heard in court. While, under present law, some courts in effect permit this result by allowing suits to be brought against district directors, your committee believes this result should be generalized. In addition,

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Senate committee reports cannot be fairly read to indicate that Congress understood that third party remedies were unavailable altogether or that other remedies, such as the refund procedure in 28 U.S.C. § 1346, were being preempted. In this regard, it is of paramount importance that neither the House nor the Senate committee reports state that the wrongful levy provisions in 26 U.S.C. § 7426 were intended to either preempt 28 U.S.C. § 1346 or become the exclusive remedy in the context of an allegedly wrongful levy.

Since neither 26 U.S.C. § 7426 nor the Senate and House committee reports explicitly and directly state that the statute was intended to preempt 28 U.S.C. § 1346 and become the exclusive remedy in a wrongful levy context, the next inquiry must involve an examination of whether the courts can infer congressional intent from the structure of both statutes. This method of ascertaining congressional intent is exemplified by *Brown v. General Services Admin.*, 425 U.S. 820 (1976) in which the Supreme Court held that the remedies available to federal employees under the Civil Rights Act of 1964 were exclusive. The Court drew inferences from the architecture of the statute, which indicated an intent by Congress to

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> your committee believes it is more appropriate, instead of bringing the actions against district directors, to bring them directly against the Government . . .
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> For the reasons given above, your committee's bill permits wrongful levy actions and actions for surplus proceeds to be brought against the Government by nontaxpayers.

H.R. Rep. No. 89-1884 at 28 (1966); Sen. Rep. No. 89-1708 (1966), 1966 U.S.C.C.A.N. at 3750-51.

provide for a comprehensive scheme to deal with employment discrimination at a time when employees had no judicial remedy. In contrast, there is nothing in the structure of 26 U.S.C. § 7426 to indicate that it was intended to be anything other than a clarification that a third party could now sue the Government directly, instead of indirectly in the context of a wrongful levy. That conclusion is amply demonstrated by the Senate and House committee reports.

Preemptive intent cannot be lightly inferred. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). In this case, the doctrine of implied repeal is discussed. The Court laid down the principle that for one statute to replace another by implication, "It is not enough to show that the two statutes produce differing results when applied to the same factual situation ..." *Radzanower*, 426 U.S. at 155. Evidence of preemptive intent must be clear and manifest. *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1058 (9th Cir. 1988). "Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

The argument regarding time and the need to resolve tax issues quickly is also not compelling when examining the time frames involved in the wrongful levy context and the refund context. A wrongful levy claim must be brought within nine months from the date of the levy unless a letter is sent to the district director requesting a return of the property, in which case the time period is extended for an additional twelve months from the date of the request. 26 U.S.C. § 6532(c)(2). An action for a refund of taxes under

28 U.S.C. § 1346(a)(1) may be brought up to two years after the Internal Revenue Service disallows an administrative claim for refund. A claim for a refund may be filed up to two years after the tax is paid. 28 U.S.C. § 6511 (a); 28 U.S.C. § 6532(a)(1). These time frames are not so materially different as to create a compelling basis for the position that the collection of the tax will remain unresolved for a substantial period of time.

There is also no sound basis on which to construct a distinction between a third party, such as EC Term of Years Trust, whose property is taken by a levy in order to keep the Internal Revenue Service from selling its property from a third party who pays a tax lien under duress. In both cases, the third party is suffering economic deprivation of an involuntary nature. In *WWSM*, the Ninth Circuit correctly observed that the lien/levy distinction advocated by the Government is not functionally sound. *WWSM*, 64 F.3d 456 at 459.

As can be seen from the foregoing, the Government's argument in support of the supposed exclusivity of 26 U.S.C. § 7426 cannot be effectively advocated by reference to the language of the statute itself or to its legislative history. Further, inferences cannot be drawn without some evidence of clear congressional intent. At its core, the Government's argument rests on the fact that 26 U.S.C. § 7426 has a nine-month statute of limitation (subject to extension as described above). This feature of the wrongful levy procedure was used in *United Sand & Gravel* to justify the inference that Congress intended for 26 U.S.C. § 7426 to be exclusive. However, that rationale is not supported by the language used in the statute and its legislative history. Congressional intent to make 26 U.S.C. § 7426 preempt the refund statute and be

the sole and exclusive remedy for a wrongful levy cannot be inferred simply by looking at the statute of limitations and concluding that it would be meaningless to hold otherwise. This method of analysis completely ignores the role of congressional intent in statutory construction. Furthermore, the rationale of *United Sand & Gravel* has now been undercut by the holding of *Williams*, which rejected the Government's argument that other remedies would become superfluous if third parties could use 28 U.S.C. § 1346. The argument that Congress must have intended 26 U.S.C. § 7426 to be exclusive simply because it has a shorter statute of limitations than 28 U.S.C. § 1346 completely sidesteps the accepted process of determining Congressional intent.

There is no good reason to contend that 28 U.S.C. § 1346 and 26 U.S.C. § 7426 do not co-exist. 28 U.S.C. § 1346 offers only post-deprivation relief while 26 U.S.C. § 7426 offers pre-deprivation relief. The argument that co-existence would render the shorter time limits of 26 U.S.C. § 7426 to be superfluous was rejected by this Court. *Williams*, 514 U.S. at 540. Further, this argument is really an attempt to circumvent the doctrine of implied repeal. "Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551.

Notwithstanding the absence of preemptive language in 26 U.S.C. § 7426, the lack of expressed preemptive intent in the legislative history, and the holding in *Williams*, the Government can be expected to argue that, at the very least, the holding in *Williams* should be confined to its facts: i.e. a situation where the third party who paid the tax lien did so

under duress and did not have an effective remedy other than 28 U.S.C. § 1346. This argument inherently involves the proposition that the courts should establish tax policy when it can be shown that making only one remedy available is more efficient from a tax collection standpoint. It may very well be that making one remedy available to a third party whose property has been seized under a levy is more efficient, but that is a decision that should be left to Congress. At this juncture, Congress has not foreclosed the use of both 28 U.S.C. § 1346 and 26 U.S.C. § 7426 by a third party whose property has been seized by the Internal Revenue Service under a levy. Until Congress takes such action, both remedies are available. Any other conclusion places this Court in the position of legislating tax policy.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the Supreme Court reverse the decision of the Fifth Circuit Court of Appeals.

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